No. 85-192

FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
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In The
Supreme Court of the United States

October Term, 1985

CIRO AUTORINO,

Petitioner,

vs.

SUPERINTENDENT, Arthur Kill Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence that proved circumstantially that petitioner stole numerous deeds and financial instruments from his employer, coupled with evidence of the employer's lack of consent to transfer those instruments, sufficed to prove petitioner's guilt of theft, forgery and the conspiracy to steal the financial instruments in this case.

2. Whether the circumstantially reliable statements of the deceased evincing his lack of consent to the wholesale transfer and negotiation of financial instruments were properly admitted in evidence under the state-of-mind exception to the hearsay rule.

3. Whether the failure to disclose to petitioner names of some other members of the conspiracy, provided by a convicted co-conspirator, violated the rule requiring disclosure of exculpatory information, where those names in no way exculpated petitioner, and the information provided by the co-conspirator was wholly incriminating.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Superintendent of the Arthur Kill Correctional Facility, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit Court of Appeals' decision denying petitioner's request for habeas corpus relief on his state conviction for forgery, grand larceny and conspiracy and imposing sentence. That decision affirmed the denial of the United States District Court of the Eastern District of New York (Sifton, D.J.), which opinion is reproduced in petitioner's appendix.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reproduced in Petitioner's Appendix at 1a-2a. The opinion of the United States Court for the Eastern District is reproduced in Petitioner's Appendix at 3a-39a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 6, 1985. The petition for certiorari was filed within 90 days of that date. This Court has jurisdiction of the petition under 28 U.S.C. §1254(1).

STATEMENT OF FACTS

The State Trial

Introduction

Petitioner Ciro Autorino was the chauffeur and handyman to William Frederick Irving Lundy for about thirteen years prior to the latter's death in 1977. Lundy, who lived in an apartment on the upper floor of the landmark Sheepshead Bay restaurant bearing his family's name, was confined to a wheelchair during the final year of his life, and led a reclusive existence, during which he saw only a very few members of an "inner circle" of relatives and employees. During his eighty years, he accumulated between fifteen and twenty million dollars in real estate, securities, and other financial instruments. Autorino, together with Mario Caliari, Joseph Ramaglia, and Eric Coursen[1], conspired to steal and did steal over $400,000 worth of these assets, forged Mr. Lundy's name and negotiated the assets for their own use.

Caliari, Coursen, and Ramaglia drafted a power of attorney from Mr. Lundy to Caliari, opened two bank accounts in the Kingston, New York, area and arranged to receive and negotiate there the checks and securities belonging to Lundy. Ramaglia impersonated Lundy in these transactions and on many occasions forged his signature. The conspirators also received and transferred 27 deeds of Lundy's real property to a trust created only for this purpose.

The Conspiracy is Launched

MARIO CALIARI and Eric Coursen had met in 1976 in connection with a proposed business venture which was unable to raise capital. In April of 1977, Coursen introduced Caliari to Joseph Ramaglia, as a potential investor; Coursen introduced

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1. Caliari testified for the government against the other three conspirators, and received a conditional discharge upon his guilty plea in this case. Coursen and Ramaglia were tried with Autorino and convicted of various charges of theft and forgery and sentenced to jail terms. Ramaglia's conviction was affirmed on direct appeal. *People v. Ramaglia*, 96 A.D.2d 518 (2d Dep't 1983). Coursen has not perfected an appeal.

Ramaglia as "Fred." (Caliari: June 5 at 127-133).[2] The next day, Ramaglia gave Caliari as his initial investment a certificate for 2000 shares of Standard Brands common stock, worth about $50,000, in the name of Frederick Lundy, and two $500 U.S. Savings Bonds, payable to and endorsed by Lundy. Ramaglia signed the stock certificate, in Caliari's presence. (Caliari: June 5 at 135-37). Caliari was unable to negotiate the securities at a Miami brokerage house without the owner of title, and he told this to defendants Coursen and Ramaglia. He asked "Fred Lundy" to go with him to the broker's office. Coursen then told Caliari that "Fred" was really Joseph Ramaglia (Caliari: June 5 at 156), that Ramaglia represented people to whom the real Mr. Lundy owed money, and that the real Lundy would not be in a position to report anything to the authorities because of his debts and his unsavory past (Caliari: June 5 at 156-58).

Caliari, Coursen, and Ramaglia returned to New York, the former two going to Coursen's upstate home. A few days later, in early April, they went to the office of attorney MELVIN HIGGINS, who had previously represented Coursen, to renew discussions concerning their proposed business venture (Caliari: June 5 at 161-63; Higgins: May 18 at 785-88). Caliari and Coursen then introduced Ramaglia to Higgins as "Mr. Lundy," and Ramaglia informed Higgins that he wished to transact business upstate through Caliari by means of a power of attorney (Caliari: June 5 at 164; Higgins: May 18 at 789-95). Shortly thereafter, on April 20, 1977, Ramaglia, Coursen, and Caliari returned to Higgins' office where Ramaglia signed the name of "Frederick Lundy" on a general power of attorney, which Higgins had prepared (Caliari: June 5 at 173; Higgins: May 18 at 796-99).

On the same day, April 20, Ramaglia, Coursen and Caliari went to the Post Office in Mount Marion, New York, a nearby town, and opened a post-office box in Lundy's name. Ramaglia

2. The hearing and trial transcripts run about 6000 pages, bound in a number of separate volumes, each paginated consecutively starting with "1." References to pages of the transcript will be made by identifying the volume by the month and date of its first page, and then citing pages of that volume. Witnesses are noted.

filled out the forms, using Lundy's name and signing as Lundy (Caliari: June 5 at 169-71). The three partners also went to the County Clerk's Office, where they recorded a copy of the power of attorney prepared by Higgins for Caliari (Caliari: June 5 at 175-76).

Later that afternoon, they all went to the Roundout Savings Bank in Kingston, and Coursen and Ramaglia opened a bank account in the name of "Frederick Lundy," using the power of attorney for Caliari. The forms were signed by "Lundy." LOUIS KOLANO, assistant treasurer of the bank, opened this account for Coursen, whom he knew well, and "Lundy," whom he could not identify. Only Coursen and Ramaglia were at the bank for this transaction (Caliari: June 5 at 177-78; Kolano: May 18 at 620-25). The next day, April 21, Coursen returned to the bank with Caliari, and a signature card for Caliari was filled out for use in the Lundy account with the power of attorney. At this time, Caliari presented 51 United States Savings Bonds in the name of "Frederick W. Lundy." The bonds bore the signature of "Mr. Lundy." The proceeds of the bonds, which were for a face value of $500 each, were to be put into the Caliari/Lundy account (Caliari: June 5 at 178-81; Kolano: May 18 at 633-37).

Mr. Kolano also arranged for "Lundy" to open an account at the Roundout National Bank, a local commerical bank, through Mr. ALBERT TEETSEL (Kolano: May 18 at 623). Accordingly, on April 22, Coursen and Caliari went to the Roundout National Bank and opened an account for "Lundy" using another copy of the power of attorney prepared by Higgins (Caliari: June 5 at 182-84; Teetsel: May 18 at 1033-36; 1084). "Mr. Lundy" never came into the bank (Teetsel: May 18 at 1036). At this time, the two businessmen presented a certificate for 2000 shares of Standard Brands stock for deposit to the account (Caliari: June 5 at 183; Teetsel: May 18 at 1035, 1051-56).

A few days later, Caliari and Coursen met Ramaglia in New York City and gave him some papers to sign for the Roundout National account. Ramaglia signed as "Lundy" (Caliari: June 5 at 185-86). They also met a man named Marc Stellato, who was described as being the man who was bringing the "stuff" that they were in the process of turning into cash

(Caliari: June 5 at 186-87). They discussed the mechanics of the operation, and agreed to a split of 40% of the proceeds for the "upstate" group, which included Coursen, Caliari, Ramaglia, and Stellato; and the remaining 60% for the "downstate" group. Caliari heard the names "Manny" and "George" later mentioned as part of the latter group (Caliari: June 5 at 187-89).

Caliari began to transact business on the two "Lundy" accounts as money and financial instruments became available. On May 4, he met Ramaglia in the World Trade Center, and gave him $300 from the upstate accounts. Ramaglia gave Caliari a check payable to Lundy, endorsed for negotiation for the Long Island Lighting Company (LILCO), in the amount of about $3200. Ramaglia also gave Caliari some Rio Grande Railroad bearer bonds. Caliari deposited these items the next day in the Roundout National Bank (Caliari: June 5 at 197-99).

A few days later, Caliari and Coursen again met Stellato in New York. They discussed the setting up of a new corporation as a trust to handle the larger amounts of cash being generated by the sale of securities, and soon to be generated by the sale of real estate (Caliari: June 5 at 207-08). Shortly thereafter, Caliari and Coursen set up a trust called "Cruz del Sur" in the Caribbean Island of Grand Turk, with the aid of a local lawyer. (Caliari: June 5 at 210). Coursen, Caliari, and Ramaglia as "Lundy" then executed and completed the trust agreement in New York, at the office of lawyer Higgins. (Caliari: June 5 at 215-18; Higgins: May 18 at 810-16). The trust was set up so that the settlor, "Mr. Lundy," retained no rights in the subject of the trust (Higgins: May 18 at 827-28).

Shortly thereafter, Coursen gave Caliari a larger number of deeds, for property belonging to Frederick Lundy (Caliari: June 5 at 219). On June 6, Caliari brought six of the deeds to lawyer Higgins' office to transfer them to the Cruz del Sur trust. Higgins insisted that "Lundy" would have to be present to sign the deeds. Caliari left the deeds with Mr. Higgins (Caliari: June 5 at 226-27; Higgins: May 18 at 835-37). Also at about this time, Caliari sold the 4000 shares of Standard Brands stock, worth about $102,000, depositing the proceeds in the Roundout National Bank account (Caliari: June 5 at 232-34). This money was divided up among Coursen, Stellato, and Caliari (Caliari: June 5 at 235-36).

During this period, Caliari also received certificates for shares of Grumman Corporation, Studebaker—Worthington, and 1006 shares of LILCO (Caliari: June 5 at 230, 247-50). These shares bore the Lundy name and were endorsed on the back. He deposited them in the Roundout National account.[3] Caliari gave Ramaglia two checks for his lawyer (Caliari: June 9 at 8 *et seq.*; May 18 at 964), and gave one to Matthew Cohen for $25,000.[4]

At this juncture, Ramaglia told Caliari that Lundy was old and sick and that, consequently, the real estate transfers should be made quickly (Caliari: June 9 at 17). On August 9, Caliari and Ramaglia (posing as Lundy) went to Higgins' office, where Ramaglia forged Lundy's name to complete the transfers to the Cruz del Sur trust (Caliari: June 9 at 18; Higgins may 18 at 843-44). Higgins immediately recorded the deeds in the Ulster County Clerk's office (Higgins: May 18 at 646-48).

Caliari spoke with Stellato about the transfer of an additional 21 deeds of Lundy property (Caliari: June 9 at 20-21). These deeds were part of the package Caliari had received from Coursen in June (Caliari: June 9 at 22). However, these deeds had been granted to the elderly Lundy so long ago that it was impractical to permit Higgins to transfer them on behalf of the bogus "Lundy," who was in his 40's. Caliari went with Cohen to his lawyer's office to transfer the 21 deeds to Cruz del Sur (Caliari: June 9 at 21-23). Caliari then gave Ramaglia the 21 deeds to sign as grantor, and received them back the next day signed (Caliari: June 9 at 24-25). Caliari then met Stellato in New York, gave the deeds to him, and received them back a few days later.

These 21 deeds had been notarized by John Ladone, and witnessed by petitioner Ciro Autorino[5] (Caliari: June 9 at

3. These transactions were corroborated by the transfer agent for LILCO and by Mr. Teetsel (W. Brady: May 6 at 742-45; Teetsel: May 18 at 1041-44).

4. Cohen, an upstate real estate man, who was to help sell the Lundy properties, was convicted of grand larceny and possession of stolen property following a trial on Kings County Indictment No. 7515/81. The charges were related to his role in this case.

5. Handwriting expert JOHN SANG stated that the "Lundy" signature on the deeds were not made by Lundy, and that the Autorino signature was authentic (Sang: June 10 at 90, 93; 177-82).

25-26). Caliari returned with Cohen to a local lawyer's[6] office to transfer the property to Sari Posner, who was Cohen's girlfriend, and Yvonne Wexler, an associate's girlfriend (Caliari: June 9 at 26-27). Caliari also discussed with Cohen the creation of a story of a transfer of valuable paintings from Cohen to the Cruz del Sur trust, as consideration for the real estate transfer. However, no such paintings were ever transferred, nor was there any intention to do so (Caliari: June 9 at 28-30).

During the months of the theft of Lundy's assets, Caliari met Stellato often and received from him various deeds, checks and securities. In return, Caliari gave Stellato both checks and cash (Caliari: June 9 at 52). Caliari also made out checks to a company Stellato owned. Of course, Caliari never spoke to Frederick Lundy, nor did he visit him or send any of the funds from Lundy's assets back to Mr. Lundy (Caliari: June 5 at 111; June 9 at 55-57).

The Trail of Theft and Fraud

Petitioner Autorino, co-defendants Ramaglia and Coursen, and other members and abettors of the conspiracy to convert Lundy's assets, left a trail of evidence demonstrating the removal and "redistribution" of the Lundy assets. Three stock certificates, seven checks, and 51 United States Savings Bonds were negotiated with a forged "Lundy" endorsement and were deposited to bank accounts associated with one or more of the defendants. Twenty-seven deeds to real property were transferred under a false "Lundy" signature according to a handwriting expert. Twenty-one of these were "witnessed" by Lundy's trusted employee, Ciro Autorino. John Sang, handwriting analyst, testified that defendant Ramaglia had in many cases signed Lundy's name. In some cases, other evidence of Ramglia's signing was presented. The securities and checks were traced into bank accounts by bank officials and an investigative

6. JOAN GRECO, secretary for Seymour Krieger in Woodbridge, New York, prepared the 21 deeds she received from Caliari in the summer of 1977, and transferred the property from Frederick Lundy to the Cruz del Sur trust, and subsequently transferred some of these deeds to Posner and Wexler. She also had the 21 deeds to Cruz del Sur filed in the County Clerk's office (Greco: June 1 at 355-360).

accountant, Seymour Baldinger. The signatures on the deeds were also examined by the expert.

Numerous corporate officials, stock transfer agents and bank officials testified that stock certificates, dividend checks, and other financial instruments payable to Frederick W.I. Lundy were sent to his address and were negotiated by members of the conspiracy and their affiliated business entities.[7]

Petitioner Orchestrates His "Cover-Up"

During August, Caliari was introduced to petitioner Ciro Autorino for the first time. Stellato drove Caliari to Brooklyn, where they met Autorino in a gas station after closing (Caliari: June 9 at 34-35). During about one and a half hours, petitioner and Caliari discussed various details of Lundy's personal life. They also invented a "cover story" of how Caliari and petitioner had met in a Brooklyn record store specializing in Italian records, had been introduced to Lundy personally through Autorino, and Caliari had finally done business with Lundy (Caliari: June 9 at 36-38).

Several days later, Caliari met petitioner again under similar circumstances. Stellato also drove Caliari past the famous "Lundy's" restaurant in Sheepshead Bay (Caliari: June 9 at 39-40). At this meeting, Caliari gave Autorino a letter written months earlier, demonstrating the beginning of a business relationship between Lundy and Caliari. Autorino was to place the letter in Lundy's office or desk[8] (Caliari: June 9 at 41-42). At this meeting, the two also made up a story that Autorino had delivered a pillowcase full of deeds to Caliari at Kennedy Airport, on Lundy's authorization (Caliari: June 9 at 44). Caliari, along with Stellato, met Autorino for the third time around September 1. Again they coordinated their stories of how their

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7. *See* testimony of BRENNAN: May 6 at 650 *et seq.;* KOVAR: May 18 at 774 *et seq.; BRADY: May 18 at* 739 *et seq.;* DEVITO: May 16 at 1039-41; SCHEINER: May 18 at 740; FISHBEIN: May 6 at 1032-33; WEBBER: May 6 at 1063; KOLANO: May 18 at 635-37; GINIVAN: May 18 at 285 *et seq.* and CONSAGNA: May 18 at 955 *et seq.* See state court brief, pp. 16-21.

8. The "Caliari letter" was found by lawyer DAVID GREEN after Mr. Lundy's death (Green: May 6 at 265). Fingerprint analyst MARGARET REICH found the petitioner's fingerprint on the letter (Reich: June 15 at 58-62).

relationship began and had been carried out (Caliari: June 9 at 44-45). On September 6, Caliari received a check from Stellato bearing Lundy's name as payee.[9] The check was drawn on the account of the estate of George Higgins, and was immediately deposited into the Lundy/Caliari account at the Roundout National Bank (Caliari: June 9 at 47-48).

JOHN LADONE operated an automobile instruction school and was a notary public. On August 30, 1977, an acquaintance came to Ladone and gave him deeds to notarize (Ladone: May 6 at 471-74). The man gave Ladone an auto registration with the name "Frederick Lundy" on it. This was the signature on all of the deeds. Ladone quickly notarized the deeds, comparing the registration signature and the signatures on the documents (Ladone: May 6 at 516, 518-518A). Ladone received $200 for his work. He never saw Mr. Lundy (Ladone: May 6 at 522-23).

Several weeks later, Ladone was introduced to several people, one of whom was petitioner Ciro Autorino (Ladone: May 6 at 523-25). Autorino told Ladone that if anyone asked about the papers he had notarized, he was to say that he came to the "Lundy's" restaurant in Brooklyn, had been let inside, and notarized the signature of an old man in a wheelchair. Petitioner told him to say he had twice come to this restaurant to notarize documents, the first time in April (Ladone: May 6 at 528-29). Autorino told Ladone to "look at his face," because they were witnesses for each other. He said, "you are the notary, and I am the witness." (Ladone: May 6 at 531). Ladone saw Autorino's face clearly, since it was still light out, and they were both trying to identify each other (Ladone: May 6 at 534).

At a later occasion, Autorino told Ladone that if he had to go into a courtroom, he would receive $5,000 for his expenses. Autorino also described the old man who signed the documents, and stated that he always wore a hat (Ladone: May 6 at 537).

9. This check had been issued by the Chemical Bank for over $9400 and was personally delivered by Green to Mr. Edward Doll for delivery to Mr. Lundy on September 1, 1977 (Green: May 6 at 248-50). The check was to be returned immediately to Green. It never was (Green: May 6 at 251-53). The check was deposited to the Lundy/Caliari account at Roundout National Bank with the "endorsement" of Mr. Lundy (Green: May 6 at 261-63; Teetsel: May 18 at 1047-48).

Ladone receive immunity from prosecution in this case (Ladone: May 6 at 578-79).

Petitioner's False Stories

DAVID GREEN had acted as one of Mr. Lundy's attorneys for about 10 years (Green: May 6 at 215). On September 6, 1977, the date of Mr. Lundy's death, Mr. Green went to the Lundy apartment and went through Lundy's files and papers, in an attempt to locate and identify the assets in his estate (Green: May 6 at 229). Green and his law partner, MICHAEL BLATTEIS, found a letter from Mario Caliari to Lundy which signified the beginning of a business relationship (Blatteis: May 6 at 169-72; Green: May 6 at 265).

On September 14, 1977, Green took a deposition from petitioner Ciro Autorino, who was Mr. Lundy's chauffeur and handyman. In that deposition, Autorino testified that he had worked for Lundy for about thirteen years. He claimed that he first met Caliari in a record store in Brooklyn, told Caliari he worked for Mr. Lundy, and Caliari gave him a business card to give to Mr. Lundy. According to Autorino, a few days after he gave the card to Lundy, Autorino overheard Lundy speaking with Caliari on the phone. Autorino claimed that a few months later, in April of 1977, he brought Caliari upstairs to see Mr. Lundy, in Lundy's apartment, but Autorino did not hear any of their conversation (Green: May 6 at 233-37).

According to Autorino, four months later, Mr. Lundy sent Autorino with a pillowcase full of documents to meet Caliari at Kennedy Airport. Autorino also stated that Lundy had received an overseas letter and possibly a package from Caliari (Green: May 6 at 238-39).

Autorino said that on another occasion, in July, Lundy told him to look for a visitor outside the restaurant, and to bring him upstairs, which he did. The person appeared to be a notary public. Lundy and the notary were signing some documents (Green: May 6 at 239-40). Mr. Lundy told Autorino to sign as a witness, and he did.[10]

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10. These "cover stories" were repeated by petitioner to law enforcement officials. Detective LAURENCE SNYDER conducted a taped interview of Autorino at Lundy's Restaurant on October 22, 1977. (Snyder: June 1 at 248, et seq.). Assistant District Attorney LEONARD MICHAELS spoke with Autorino five days later at Lundy's Restaurant (Michaels: June 15 at 275, et seq.).

Mr. Lundy Speaks Through His Retinue

Frederick Lundy was described as a reclusive man by the very few who were permitted to see him. EDWARD DOLL, WALTER LUNDY, and GERALD MINGIONE all worked for Lundy. Attorney David Green and Ms. MARIAN ANDERSON also were permitted access to him.

For the last year of his life, in which he was confined to a wheelchair, Lundy lived in the apartment on the top floor of his restaurant. His cousin, Walter Lundy, lived in the apartment at Mr. Lundy's request. Prior to that, GEORGE HIGGINS, Lundy's nephew, had lived there (Walter: May 18 at 126, 227; G. Higgins: May 18 at 87-88). Both Walter and Higgins worked for Lundy for many years in the restaurant, but Lundy was clearly the boss of the operation (Walter: May 18 at 126, 132, 222, 263; G. Higgins: May 18 at 87, 118-19). George Higgins' leg was amputated in late 1976, and he moved out of the apartment (G. Higgins: May 18 at 119-20). Walter spent "all of his time" with Mr. Lundy. Walter usually let Autorino into the restaurant at about 8:00 a.m. Petitioner was one of the few other people who saw Lundy. Petitioner often brought Lundy his mail and his food (Walter: May 18 at 127, 133, 152, 207).

Autorino was the chauffeur and handy man. Besides Walter, only petitioner had access to Lundy (Walter: May 18 at 134). Lundy did not allow strangers upstairs and conducted his business by telephone when he could not go downstairs (Walter: May 18 at 152-33).

Several months before Lundy died, he told Walter Lundy that he was missing a certificate for Standard Brands stock. As far as Walter knew, Lundy did not find it (W. Lundy: May 18 at 157-59). His uncle also told him that he would not sell his real estate, but would only buy more (W. Lundy: May 18 at 181; Doll: May 18 at 1127-28).

Edward Doll and Gerald Mingione were also long-time employees. Doll, who started as a cashier in 1959, saw Lundy only about a dozen times but spoke to him often by phone (Doll: May 18 at 1113-14). Mingione, an accountant, started as

a bookkeeper for the business and also took care of Lundy's personal financial matters (Mingione: May 6 at 1086-88). Although he spoke to Mr. Lundy often by phone, he last saw him in 1974 (Mingione: May 6 at 1094, 1104, 1148).

Doll's and Mingione's duties included managing the daily operation of the restaurant. At the end of the day's business, they sent the cash register tapes, time sheets, and other business records up to Lundy. Autorino usually took them upstairs. Lundy kept a close watch over the restaurant's daily operations (Doll: May 18 at 1113, 1118-9); Mingione: May 6 at 1090-94, 1106-07; 1158-59).

Doll used to make deposits at Lundy's bank on Flatbush Avenue in Brooklyn. He went once a week. He stopped going about a year before Lundy's death, and the deposits were picked up by armored truck at the restaurant (Doll: May 18 at 1119-21). Twice in 1976, Doll went to the bank to inventory the securities and cash in Lundy's safety deposit box. Each time he met EDWARD EHLERS, the bank's manager, who called Lundy. On each occasion, Lundy gave Doll a one-day power of attorney to permit him access to the vault (Doll: May 18 at 121-23; Ehlers: May 18 at 414, 439, 481-59). Ehlers would again call Mr. Lundy to verify the transaction (Doll: May 18 at 1123; Ehlers: May 18 at 402, 489). Several restricted powers of attorney, notarized by Ehlers, were received in evidence (Doll: May 18 at 1125-27).

Mingione was a notary public and often notarized documents at Mr. Lundy's request. He did not, however, see Lundy sign these documents. He usually spoke to Mr. Lundy beforehand, and then notarized the documents in the restaurant office (Mingione: May 6 at 1122-25). He was thoroughly familiar with Lundy's three accounts at the Manufacturers Hanover branch on Flatbush Avenue, and a single account at a branch in Bellmore, Long Island. He never saw any checks to or from Mario Caliari, Marcello Stellato, Eric Coursen, Revere Kitchens, Cruz del Sur, or any other people and entities involved in the conspiracy, nor was he aware of any transaction at the Roundout National or Roundout Savings Banks in Kingston (Mingione: May 6 at 1129, 1112, 1116-18).

Ms. MARION ANDERSON knew Lundy for fourteen years

and developed a "close" relationship with him. When she was allowed upstairs, she only saw Lundy in the outer room to the apartment, and never was permitted inside until the night of his death (Anderson: May 6 at 870-74; 880). Ms. Anderson only saw Lundy twice in the two years before August 1977, but saw him three times when he was very ill just before he died (Anderson: May 6 at 878-76). She spoke to him very often by telephone, almost every day (Anderson: May 6 at 878).

A few months before his death, Lundy complained to Ms. Anderson that his mail, including some checks and bonds, was not being sent to him. She began to pick up his mail at the post office and bring it to the restaurant (Anderson: May 6 at 897-88). She usually delivered the mail bound with a string. She left it either with Doll, Walter Lundy or Autorino. Sometimes petitioner would come to her house to walk the dogs and she would give him the mail (Anderson: May 6 at 889, 940, 986-87).

In 1977, Lundy told Anderson that he wanted to buy some more property upstate, near Ellenville. He also told her he would not invest his money overseas, because he made his money in this country and it would stay here (Anderson: May 6 at 895-97). Just before Lundy died, he told Ms. Anderson that he was missing a large check which had been delivered to him by Mr. Green, his lawyer (Anderson: May 6 at 907-08). Lundy asked her to become a notary in 1976 and she did, but she never notarized anything for him thereafter (Anderson: May 6 at 903, 986). Lundy left her $25,000 in his will (Anderson: May 6 at 995).

The scheme to steal Mr. Lundy's securities and property was predicated on the proposition that the old man would not discover the peculations in time to advise anyone, and that the conspirators could claim to others that they had his agreement. Two of Lundy's attorneys, the caretaker of his upstate property, and members of his "small circle" testified to actions of Lundy prior to his death that were incompatible with any such agreement.

Attorney Green had left four checks, including a $9497 check to Lundy as a co-executor's fee for the estate of George Higgins in an envelope for Lundy to sign and return to him. When the envelope was returned, three checks were in the envelope and

this check was missing. Green called Lundy just prior to his death to ask Mr. Lundy if he had the check. Lundy told him to call Doll, who had mailed the checks (Green: May 6 at 248-252). Doll gave these checks to Autorino and received them later that day (Doll: May 18 at 1040-42). Mr. Lundy asked Mingione about this check a few days before he died, and Mingione told Lundy that he did not have it. Later that day, Lundy told Mingione he was concerned that some stock certificates were also missing and he wanted someone to go to vault to look for them. Lundy died before anyone did so (Mingione: May 16 at 1119-22).

The Sunday before he died, Lundy asked FRANK ECK, the caretaker of his upstate property, about the estate, including new construction on a barn. Lundy never mentioned disposing of the property or letting Eck go (Eck: May 18 at 364-67). Earlier that summer, Lundy told Eck he was interested in buying some of the property adjoining the Warwarsing estate, but the deal fell through (Eck: May 18 at 368-69).

In August 1977, Lundy had called Eck and discussed putting up new "No Trespassing" signs on the property. Eck ordered 2000 signs from the Roundout Publishing Company (Eck: May 18 at 374-76; WAINER: May 28 at 31-35). During that summer, Lundy also told Eck he would like to fix up some cottages on the property for rental property (Eck: May 18 at 378-80). Lundy received mail at his post office box in Warwarsing, and reimbursed Eck for the payments on that P.O. box (Eck: May 28 at 372).

Before he died, Mr. Lundy never mentioned to his attorneys, Green and PATENT (Patent: May 16 at 830 *et seq.*), the creation of an investment trust,[11] nor did he mention to those who had access to him the names of the defendants, Ramaglia and Coursen, their accessories (*i.e.*, Stellato, Caliari or Cohen), the Roundout National or Savings Banks, or the business entities that received the proceeds of the Lundy property (Green: May 6 at 296, 300; Patent: May 6 at 843; Anderson: May 6 at 898-9; Mingione: May 6 at 1116-18; W. Lundy: May 18 at 163-64;

11. About seven or eight years earlier, he had mentioned to Green the possibility of setting up a trust for his employees' benefit (Green: May 6 at 295-96).

Doll: May 18 at 1120). No documents were found in Lundy's office or apartment that connected with these people and entities (Green: May 6 at 266-68; Blatteis: May 6 at 168-9; 194-6). In addition, Lundy never authorized anyone to sign his name for him (G. Higgins: May 18 at 105).

The Defense Case

Petitioner presented no witnesses. Ramaglia admitted that he acted as Lundy and signed the dead man's name to numerous financial instruments. Co-defendant JOSEPH RAMAGLIA stated that he knew Coursen prior to 1977, and that the two became involved in a business venture in early 1977 (Ramaglia: June 22 at 593, 595-602). He met Caliari in early 1977 and later was introduced to another possible investor in the venture (Ramaglia: June 22 at 597-600). In April of 1977, Caliari informed him that he had found a backer for their business. Caliari would set up a trust fund, and would begin a series of "elaborate" investments (Ramaglia: June 22 at 604).

In April, Caliari informed Ramaglia that he had an investor named Lundy, and he asked Ramaglia to go with him and sign Lundy's name. According to Ramaglia, Caliari showed him what Ramaglia thought was a "power of attorney" from Lundy to Caliari (Ramaglia: June 22 at 605-07). Nonetheless, Caliari asked Ramaglia to obtain yet another power of attorney, "on Lundy's orders." (Ramaglia: June 22 at 605, 607). As a result, Ramaglia along with Caliari and Coursen went to the law offices of Melvin Higgins to execute a power of attorney from Lundy to Caliari. Ramaglia signed as Lundy, an act he claimed he was authorized to do. Later that day, Ramaglia went with his two "partners" to the post office, a telephone answering service, and to the Roundout Savings Bank, where Ramaglia continued to "make believe" he was Lundy and signed Lundy's signature (Ramaglia: June 22 at 610-14).

Ramaglia admitting signing as "Lundy" the six deeds given to Higgins in June, the Cruz del Sur trust agreement, two or three stock certificates, and a number of checks he had received from Stellato, whom he knew to be part of the meat-importing venture (Ramaglia: June 22 at 615, 515-617). Although he deposited about $68,000 into his personal bank account, he

gave much of the money to Stellato and "only" kept about $8,000 to $10,000 in addition to an $11,000 check from Caliari, which he used as a down payment on his house (Ramaglia: June 22 at 618-23).

The Conference Concerning Stellato's Prior Statements

At the conclusion of the defense case, the prosecution declared it would call Marcello Stellato, a convicted conspirator, to rebut Ramaglia's testimony (June 22: 819). At this time, the prosecution was obliged under New York law to disclose to defendant prior statements of the witness. *People v. Rosario,* 9 N.Y.2d 286 (1961). The prosecutor requested that certain parts of the witness's prior statements be withheld from the defense, because their disclosure might endanger the witness and his family (June 22: 821 *et seq;* 827-28). The court agreed to consider this request in an *ex parte* conference in chambers, N.Y.C.P.L. §240.90(3) (June 22: 872-76).

In the *ex parte* hearing, the prosecutor disclosed that three named individuals were involved along with Autorino in the theft related to this case, and also in a prior burglary of the Long Island estate (June 22: 878-89). Stellato would testify that Autorino was introduced to him by these intermediaries as the "inside man" who took the stock certificates, checks, and deeds that were the subject of the prosecution (June 22: 881-82). Stellato was afraid that disclosure of his role as an informant against these intermediaries, especially one "Sanitori," would lead to reprisals against the witness or his family (June 22: 882, 887-88).

The court denied the prosecutor's request to withhold this material from the *Rosario* disclosure. (June 22: 898). The prosecutor then declined to call Stellato (June 22: 900). The defense never indicated it was interested in calling Stellato to the stand.

On July 10, 1981, the jury convicted petitioner of two counts of conspiracy (second and third degrees), four counts of first degree forgery, seven counts of second degree forgery, and eleven counts of grand larceny (second degree).

Sentence

On August 26, 1981, the court sentenced petitioner and his two co-defendants. In regard to Autorino, the court observed:

> THE COURT: I consider this defendant primarily liable. Without his participation, nothing else would have been possible (August 26: 21).

On four charges of first-degree forgery, he received five to fifteen years (New York Penal Law §170.15); on seven counts of second-degree forgery, two and one-third to seven years (New York Penal Law §170.10); on eleven counts of grand larceny, second-degree, two and one-third to seven years (N.Y.P.L. §155.35); on second-degree conspiracy, one and one-third to four years, and on second-degree conspiracy, one year (P.L. §§105.05 and .10 respectively). All terms were to be concurrent. The court also imposed three fines on the grand larceny charges, totalling $400,000. (Minutes of August 26, 1981, pp. 21-24).

The State Appeals

Petitioner's conviction was affirmed on direct appeal, *People v. Autorino*, 96 A.D.2d 514 (2d Dep't 1983). In his brief, he raised the three points upon which the instant petition is based. The state court wrote a short opinion dealing with another issue. Leave to the New York Court of Appeals was later denied, 60 N.Y.2d 964.

REASONS WHY THE WRIT SHOULD BE DENIED

This New York state conviction presents no issue of constitutional dimension worthy of this Court's review by certiorari.

Nowhere in his petition does petitioner explain why this Court should review this case. There is no suggestion that the Second Circuit Court of Appeals, in affirming the District Court's denial of *habeas* relief, decided a question in conflict with the applicable decisions of this Court or other circuit courts, nor is there any claim that that court decided an important question of law which has not been, but should be, settled by this Court. *See* U.S. Sup. Ct. Rule 17, 28 U.S.C.; *Boag v. MacDougall*, 454 U.S. 700 (1982) (dissenting opinion of Rehnquist, J.). Instead, petitioner simply repeats his contentions in the courts below, treating the petition to this Court as though it were simply another appeal to a court with plenary jurisdiction over all the issues raised.

Moreover, his three claims present neither novel nor legally

to these transactions (*see* Point II, *infra*). In two instances, he had noticed property was missing: a check (from the Higgins' estate), and a stock certificate (Standard Brands), both of which conveniently turned up in the hands of the conspirators. In addition, the testimony of Caliari about the background, the inception, and the execution of the conspiracy, clearly without Lundy's consent, helped to establish both the working of the conspiracy as well as the roles of its members, including Autorino. Finally, the testimony of Caliari and Ladone set forth attempts by Autorino to legitimize the transactions by falsely alleging that Mr. Lundy gave the assets to Caliari. The accusations of knowing falsity were corroborated by Autorino's deposition to Green and his statement to the detective and the assistant district attorney.

In review of a state court conviction for *habeas corpus* purposes, the question before the reviewing court "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). In reviewing the sufficiency of the evidence at trial, New York courts follow this standard. *In the Matter of Anthony M.,* 63 N.Y.2d 270, 280 (1984), *People v. Contes,* 60 N.Y.2d 620, 621 (1983). The state court found that petitioner's participation in the crimes was "overwhelmingly established." 96 A.D.2d at 514. The District Court also found the evidence, after a detailed analysis, to be sufficient according to law (Petitioner's Appendix, pp. 16a, 18a), and the Court of Appeals agreed. The evidence at the trial clearly supported these conclusions, and petitioner's contrary claim presents no question worthy of this Court's review.

POINT II

ADMISSION OF RELIABLE OUT-OF-COURT DECLARATIONS BY LUNDY RELATING TO HIS STATE OF MIND WAS PROPER UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

Petitioner Autorino contends that by admitting into evidence certain statements made by the late Mr. Lundy which related to Lundy's state of mind, the court violated his sixth

amendment right of confrontation. Autorino's contention on this appeal is not too far removed from the fundamental—but erroneous—assumption of the conspirators in the genesis of this case: that because only the reclusive, eccentric, and obviously ailing Mr. Lundy could say whether or not he had consented to or authorized these financial transactions with and by these audacious individuals, there could be no sufficient proof against them on this issue. Although an accused has the right to confront his accusers, the "state-of-mind" testimony did not violate this right.

The right to confront witnesses is guaranteed under both the federal and state constitutions. However, this right "has never been interpreted in such a way as to mandate the wholesale abrogation of the hearsay exceptions at a criminal trial." *People v. Sanders,* 56 N.Y.2d 51, 63 (1980), which adopted the Supreme Court's rule in *Ohio v. Roberts,* 448 U.S. 56, 63 (1980), and other cases. In the *Roberts* case, this Court set forth a two-step approach in evaluating whether the right of confrontation is violated by admission of a hearsay declaration: first, the hearsay declarant must be unavailable; second, the declaration itself must possess an "adequate index of reliability" to permit its admission into evidence. This reliability may be inferred form the fact that the statement falls into a recognized exception to the hearsay rule. *Ohio v. Roberts,* 448 U.S. at 65-66; Accord: *People v. Sanders,* 56 N.Y.2d at 64.

Both prongs of the *Roberts* test are satisfied in this case. It is beyond dispute that the unavailability of Mr. Lundy by virtue of his death is conclusive of his inability to address the issue of his consent. The second prong is satisfied by the *prima facie* circumstance that the statements were within the generally recognized state-of-mind exception to the hearsay rule.[13] Prince, *Richardson on Evidence,* §205 (10th Edition); *Wigmore*

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13. Out-of-court declarations admitted under this doctrine are often called "apparent exceptions," because they may not be truly admitted for the truth of their content. *Richardson, supra* §§203-05. Thus, Ms. Anderson's testimony about one of Lundy's conversations was admitted by the court with the express instruction that it was not admitted for the truth of the subject matter, but the mere making of the statement (Anderson: May 18 at 883-86). Accord, *People v. Davis,* 58 N.Y.2d 1102 (1983) (*res gestae* statement).

on Evidence, §1790 (Chadbourn Rev.), *United States v. Di Maria,* 727 F.2d 268, 272 (2d Cir. 1984); *United States v. Zito,* 467 F.2d 1401, 1404 (2d Cir. 1972). *Provenzo v. Sam,* 23 N.Y.2d 256 (1968); *Loetsch v. N.Y.S. Omnibus Corp.,* 291 N.Y. 308 (1943). Moreover, the hearsay statements were of the type that clearly satisfied the reliability test under *Roberts* and *Sanders*..

The statements referred to were additionally reliable because of the circumstances under which they were made. In many instances they were made in the presence of more than one person. Moreover, Lundy's statements about his property and intentions to Green, Patent, Mingione, Ehlers, and Walter Lundy could not have been made to advance Lundy's own self-interest, because they were all made at a time before any litigation had been commenced. Because these declarations were made conversationally and not with an eye toward any self-interest, Mr. Lundy could hardly have perceived a benefit in statements that he wished to buy, not sell upstate properties, that he did not wish to make overseas investments, or that he had not received a check for the Higgin's estate that ultimately found its way into the "Lundy/Caliari" account at the Round-out National Bank. Moreover, most of the statements are independently corroborated by other witnesses. Among these statements are those of Eck, his upstate caretaker, that Lundy fixed up the property, ordered new "no trespassing" signs, and wanted to buy neighboring properties (corroborated by real estate man Weider and signprinter Wainer); the discussions about the missing executor's check (independently related by lawer Green, Mingione, and Ms. Anderson), and of the missing Standard Brands stock certificate (testified to by both Mingione and Walter Lundy); and statements about the desire to add his real estate holdings (testified to by Eck, attorney Patent, and Ms. Anderson). In addition, one of the most damaging circumstances reflecting on Mr. Lundy's "state of mind" was the total absence of any mention of the people or business entitles linked to the conspiracy, as testified to by Green, Patent, Mingione, Ms. Anderson, Doll and Walter Lundy. This was corroborated by the absence of any documents in Lundy's

possession, which one might expect to find in trailing the disposition of millions of dollars of assets. Moreover, this negative evidence of conversations (which did not occur) was not in any was hearsay, *Richardson, supra,* §200.

In addition to the independently verified checks on the reliability of these "state-of-mind" declarations, there are several other good reasons why these statements do not violate the principles of *Roberts* and *Sanders*. First, the witnesses who testified to the out-of-court statements were *themselves* available for cross-examination, a factor of considerable significance in *Dutton v. Evans,* 400 U.S. 74, 87 (1980). In this case, the intimates of Lundy, employees, attorneys, business associates, and relatives testified to Lundy's statements. Counsel cross-examined them on their individual self-interest, as possible legatees under the will (e.g. June 22: 980, 1097-98). Because petitioner contended that these statements attributed to Lundy benefitted the estate and these "legatee-witnesses", their personal confrontation was presumably more critical than confronting the deceased Mr. Lundy. Just as the confrontation of Shaw in *Dutton v. Evans,* helped satisfy Dutton's Sixth Amendment right to confront witnesses, so confrontation was served by the examination of the "hearsay" declarants in this case.

A second compelling factor which belies defendant's confrontation claim is the fact that the hearsay statements of Lundy did not in any way "accuse" Autorino. Most cases which have evaluated the confrontation clause claim have dealt with hearsay which tended to violate the basic prohibition against hearsay or "affidavit" accusations, *Ohio v. Roberts,* 448 U.S. at 63-64; *Dutton v. Evans,* 400 U.S. at 89; *California v. Green,* 399 U.S. 149, 157 (1970); *Bruton v. United States,* 391 U.S. 123 (1968). In this case, the out-of-court declarations of Lundy never accused Autorino or his co-defendants of any particular improper act. Thus, the claim that there was no confrontation is one of form rather than substance. Moreover, the conversations took place when no motive to fabricate or "accuse" existed. Conversations with Eck, Patent, and Ms. Anderson about Lundy's real estate could hardly have had any intrinsic lack of reliability. Conversations with Walter Lundy about the missing stock certificates, or with Green and Mingione that the executor's check

was missing, surely were made without hidden reasons. None of these statements reflected directly on Autorino or his co-defendants but they were highly probative of the issue of Lundy's lack of consent to these multitudinous transactions.

In sum, the conversations of Lundy which were admitted by the court under a well-established exception to the hearsay rule did not violate the defendant's right to confrontation. *Ohio v. Roberts,* 448 U.S. at 65-66 and *People v. Sanders,* 56 N.Y.2d at 64. The reliability of the statements was satisfactorily demonstrated. Moreover, the statements never accused the defendant of any crime or of any act at all which bore directly on this case. Thus, his confrontation claim is without merit. Furthermore, if one or more of these nonaccusatory statements did not satisfy the test of *Ohio v. Roberts,* its admission into evidence, as the District Court found (Petitioner's Appendix, pp. 34a-35a), clearly would be harmless beyond a reasonable doubt. *Brown v. United States,* 411 U.S. 223, 231 (1973). *Schneble v. Florida,* 405 U.S. 427 (1972).

POINT III

THE FAILURE TO DISCLOSE TO THE PETITIONER THE INFORMATION KNOWN TO STELLATO DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS.

At the conclusion of the testimony of co-defendant Joseph Ramaglia, the prosecutor intended to call Marcello Stellato, an indicted and convicted member of the conspiracy whose name had been mentioned in the course of the trial (June 22: 817, 819). The prosecutor later changed his mind. Petitioner contends that the failure to provide him with the information possessed by Stellato abridged the state's obligation under *Giles v. Maryland,* 386 U.S. 66 (1966). Because Stellato would have inculpated, not exonerated Autorino, as the District Court observed, this claim is without merit.

At the conclusion of the defense case, the prosecutor indicated that he would call Stellato to refute some of Ramaglia's partially exculpatory statements. Prior to doing so, however, he properly informed the court that he had material which had to be given to the defense in aid of cross-examination under *People*

v. Rosario, 9 N.Y.2d 286 (1961) (June 22: 819 *et seq.*). However, he wished to redact this material for reasons later explained (June 22: 821-27, 878-82). The prosecutor asked for protective action by the court, and for an *ex parte* hearing in which to explain his position, as provided by New York C.P.L. §§240.50(1) [June 22: 866-67; 872-76]. At this *ex parte* proceeding, the prosecutor revealed that Stellato, who had pled guilty in this case, was in fear of physical retaliation from two other members of the conspiracy, "Sanitori" and Kasselakis. These two had allegedly been responsible for other documented murders (June 22: 822; 878-85). Thus, the prosecutor wished to excise the names of these men from the *Rosario* material, and from Stellato's testimony (June 22: 887-88; 893-94). However, the court declined the requested relief as being too restrictive of the defense (June 2: 898-99; 900-01). The prosecutor decided, therefore, that would not call Stellato (June 22: 902). No further testimony was adduced.

In *Brady v. Maryland,* 373 U.S. 83 (1964), this Court held that due process requires the prosecutor to furnish the defense, on demand, any and all exculpatory evidence, 373 U.S. at 87. In *Giles v. Maryland,* the court extended this obligation to matters favorable to the defense, even those affecting credibility. However, in *United States v. Agurs,* 427 U.S. 97 (1976), this Court held that failure to disclose matters solely affecting credibility did not necessarily violate the right to a fair trial. It is clear that in this case the petitioner is entitled to no relief.

The potential testimony of Stellato was neither exculpatory nor "favorable" to the petitioner. Indeed, among the matters that Stellato's prospective testimony could have covered was that Autorino had received money in a prior larceny involving theft of Lundy family property, and that Autorino was introduced to Stellato by those two intermediaries as the "inside man" who took the property in this case (June 22: 880-82). Such revelations hardly seem to fall into the category of evidence "favorable" to the petitioner.

Petitioner's current claim that somehow this case be used as "a vehicle to adopt a per se rule" requiring disclosure of a defendant's accomplices was never argued either in the District Court or the Second Circuit. As the District Court's com-

prehensive opinion makes clear, petitioner relied on an alleged violation of due process under *Brady* and its progeny. Petitioner's Appendix, pp. 35a-38a. Clearly, there was no violation of a failure to disclose under *Brady*. This Court will not rule on matters not decided by the lower court's decisions. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Walters v. City of St. Louis,* 347 U.S. 231, 233 (1954).

Finally, any claim that the failure to disclose Stellato's potential testimony as to other accomplices kept petitioner "in the dark" in meeting the accusation is without merit. Defendant never requested the names of other co-conspirators. Because Stellato's information was neither exculpatory of Autorino nor remotely favorable to him, there was no failure to disclose under *Brady v. Maryland* or its progeny.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR CERTIORARI, SHOULD BE DENIED.

Dated: Brooklyn, New York
September 4, 1985

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